

IN THE MISSOURI SUPREME COURT

Case No. 084372

STATE EX REL. CINDY KERTZ,

Relator,

v.

THE HONORABLE MARGARET M. NEILL,

Respondent.

On Petition For Writ Of Mandamus

Directed To

**Honorable Margaret M. Neill
Circuit Judge, Missouri Circuit Court
Twenty-Second Judicial Circuit**

SUPPLEMENTAL BRIEF OF RELATOR

**PATRICK J. HAGERTY #32991
MAURICE B. GRAHAM #18029
MORRY S. COLE #46294
Gray, Ritter & Graham, P.C.
Suite 800
701 Market Street
St. Louis, Missouri 63101
(314) 241-5620
(314) 241-4140 (Fax)**

COUNSEL FOR RELATOR

TABLE OF CONTENTS

Error! No table of contents entries found.

INTRODUCTION

On September 17, 2002, this Court heard arguments in the above-captioned case. That same day, an Order was issued by this Court directing the parties to file supplemental briefs regarding the possible application of Section 351.690(4), RSMo. In accordance with the limitations set forth in Rule 84.06 applicable to reply briefs, Relator submits to this Court her Supplemental Brief.

TABLE OF AUTHORITIES

Cases

<u>State ex rel. Henning v. Williams</u> , 131 S.W.2d 561 (Mo banc 1939).....	10
<u>State ex rel. Kansas City Transit, Inc. v. Public Service Commission</u> , 406 S.W.2d 5, 11 n.6 (Mo. banc 1966).....	6, 12
<u>State ex rel. Smith v. Gray</u> , 979 S.W.2d 190 (Mo banc 1998)	6, 10

Statutes

§351.120	15
§351.375	6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17
§351.690	6, 8
§351.690(1)	15
§351.690(2)	16
§351.690(4)	2, 7
§508.010	6, 7
§508.010(2)	6
§508.040	6, 7, 9, 10, 11, 16

Chapter 351	9, 12
-------------------	-------

Rules

Rule 84.06.....	2
-----------------	---

JURISDICTIONAL STATEMENT

Set forth in Relator's Brief.

STATEMENT OF FACTS

Set forth in Relator's Brief.

POINTS RELIED ON

II. RELATOR IS ENTITLED TO A WRIT OF MANDAMUS COMPELLING RESPONDENT TO VACATE HER ORDER OF DECEMBER 18, 2001 GRANTING THE MOTION TO TRANSFER VENUE, BECAUSE IF §508.010 APPLIED AS RESPONDENT HELD, DEFENDANT BURLINGTON NORTHERN SANTA FE IS A RESIDENT OF THE CITY OF ST. LOUIS, MAKING VENUE APPROPRIATE UNDER §508.010(2), RSMO.

State ex rel. Smith v. Gray, 979 S.W.2d 190 (Mo banc 1998)

State ex rel. Kansas City Transit, Inc. v. Public Service Commission,

406 S.W.2d 5 (Mo. Banc 1966)

Section 351.375, RSMo.

Section 351.690, RSMo.

Section 508.040, RSMo.

ARGUMENT

POINT II

RELATOR IS ENTITLED TO A WRIT OF MANDAMUS COMPELLING RESPONDENT TO VACATE HER ORDER OF DECEMBER 18, 2001 GRANTING THE MOTION TO TRANSFER VENUE, BECAUSE IF §508.010 APPLIED AS RESPONDENT HELD, DEFENDANT BURLINGTON NORTHERN SANTA FE IS A RESIDENT OF THE CITY OF ST. LOUIS, MAKING VENUE APPROPRIATE UNDER §508.010(2), RSMO.

This Court asked, by Order issued the same day as oral argument in this case, that the parties file supplemental briefs “regarding the possible application of §351.690(4), RSMo.” Relator will first recap how this case has reached this point, using citations sparingly to avoid unduly lengthening the brief. Relator addresses only Point II of her brief, as the Court’s request does not concern Point I.

Relator sought this Court’s Writ of Mandamus because Respondent had applied §351.375, RSMo. to BNSF, a foreign railroad corporation, and found that under §508.010, BNSF’s “residence” was exclusively in St. Louis County, where its registered agent maintains its office. Relator challenges this ruling because BNSF is a foreign corporation to which §351.375 does not apply. Further, BNSF is a railroad corporation and Respondent’s Order limits severely the scope of railroad venue expressed in §508.040. Importantly, §351.375 says nothing about venue, and it is only by this Court’s decisions in the 1950’s and 1960’s that this statute has been declared to be a venue fixing

statute. Finally, one member of this Court, Judge Wolff, has suggested that a large percentage of venue fights could be resolved by simply concluding that §351.375 adds another residence of a corporation, not its exclusive residence.¹

In the Court's continuing quest to divine the intent of the Legislature, the parties are now asked to discuss §351.690(4), and Relator turns to it now.

A. The Text Of Section 351.690(4)

Near the end of Chapter 351 is §351.690, "Applicability of Chapter to Certain Corporations." Section (4) states:

(4) Only those provisions of this chapter which supplement the existing laws applicable to railroad corporations, union stations, cooperative companies for profit, credit unions, street railroads, telegraph and telephone companies, booming and rafting companies, urban redevelopment corporations, professional corporations, development finance corporations, and loan and investment companies, and which are not inconsistent with, or in conflict with the purposes of, or are not in derogation or limitation of, such existing laws, shall be applicable to the type of corporations mentioned above in this subdivision; and

¹ *State ex rel. Smith v. Gray*, 979 S.W.2d 190, 195-96 (Mo. Banc 1998) (Wolff, J., concurring)

without limiting the generality of the foregoing, those provisions of this chapter which permit the issuance of shares without par value and the amendment of articles of incorporation for such purpose shall be applicable to railroad corporations, union stations, street railroads, telegraph and telephone companies, and booming and rafting companies, professional corporations, development finance corporations, and loan and investment companies, and those provisions of this chapter mentioned in subdivisions (1) and (2) of this section will apply to all corporations mentioned in this subdivision; except that, the annual report and fee of a professional corporation pursuant to Section 356.211, shall suffice in lieu of the annual registration and fee required of a business corporation.

Respondent, through BNSF, takes the position in this case that §351.690(4) somehow supports the extension of §351.375 to foreign railroad corporations. Nothing could be further from the truth.

It is necessary, at this point, to state what was the “existing law” regarding railroad corporation residence at the time Chapter 351 was enacted. One really need look no further than §508.040.

This Court in State ex rel. Henning v. Williams, 131 S.W.2d 561 (Mo banc 1939), looked to the predecessor of §508.040 to determine a corporate defendant’s residence – even though such corporate defendant was joined with an individual. The Court stated that when corporations are sued alone they can be sued wherever they have offices or agents, “we can see no reason why their residences should not be regarded as established in the same way when, perchance, they are joined as defendants with another.” Id. at 656.

Thus, under the common law as declared by Henning, and quite clearly under §508.040, a railroad’s residence for venue purposes had little if anything to do with where it placed its registered agent. Further, as this Court made clear in State ex rel. Smith v. Gray, 979 S.W.2d at 193, the 1943 law did not alter the common law for corporations not covered by the amendment. Thus, in deciding whether §351.375 can be judicially grafted upon a foreign railroad corporation, the Court must consider whether to do so upsets the “existing laws applicable to railroad corporations.” Beyond question, it does.

Recall that §508.040, enacted long before 1943, established venue for suits against corporations as where the cause of action accrued or where the corporation has an office or agent for transaction of its business,

“or in case the corporation is a railroad company
owning, controlling or operating a railroad into or through
two or more counties in this state, then in either of such
counties . . .” §508.040.

Respondent's counsel took the position in oral argument that §351.690(1) extends §351.375 to railroads because the latter "supplements" existing laws applicable to railroad corporations. Even if this were true, this is only half the equation. The purported "supplementing" law, to apply to railroads, must not be:

- 1) inconsistent with existing laws; or
- 2) in conflict with the purposes of existing laws; or
- 3) in derogation or limitation of existing laws.

Importantly, if the "supplementing" law has any of these effects it cannot apply to railroads. This is evidenced by the disjunctive "or" used in the statutes. Extending §351.375 to railroads, in the face of §508.040, has all of the deleterious effects described above. It is inconsistent with the venue statute because §508.040 is extremely broad, while "exclusive residence" provision is exceedingly narrow.

An exclusive residence provision is in conflict with the purposes of §508.040. If we assume, as we must, that the Legislature intended that railroads be subject to extremely broad venue, how is that purpose accomplished by an exclusive residence interpretation of §351.375?

An exclusive residence provision is in derogation of and in limitation of §508.040. For this Court to extend an exclusive residency statute to a foreign railroad corporation would be to put a stranglehold on the existing law governing the residency of railroads, as embodied in §508.040.

B. The Intent Of Section 351.690

This Court has resorted to §351.690 only rarely, no doubt owing to its general, “catch-all” language. However, in State ex rel. Kansas City Transit, Inc. v. Public Service Commission, 406 S.W.2d 5, 11 n.6 (Mo. banc 1966), the Court stated:

“Section 351.690(3)² indicates an intention of the Legislature that Chapter 351 should not affect companies such as street railway companies where to do so would be inconsistent with, in derogation of, or in conflict with the purpose of, existing laws with reference to such companies.”

The transit company in Kansas City Transit argued that it was free to make capital distributions to stockholders from its capital surplus account without prior Public Service Commission approval, despite statutory language to the contrary. The company’s argument was essentially the same as that of BNSF here, i.e., that Chapter 351 allowed corporations to make such capital distributions. This Court pointed out however, that the company chose to operate as a street railway company, and thereby is excluded from Chapter 351 in certain respects, as stated in §351.690(4). Kansas City Transit, 406 S.W.2d at 10-11.

The effect of §351.690(4) is to limit the extent to which railroad corporations are subject to the jurisdiction of Chapter 351. Specifically, railroad corporations are only

² A 1975 amendment renumbered the subsections of RSMo. §351.690, such that subsection (3) was renumbered subsection (4).

within the purview of Chapter 351 where such laws “are not inconsistent with, or in conflict with the purposes of, or are not in derogation or limitation of, such existing laws.” *Id.* Because §351.375, the lynchpin of Respondent’s argument, is in derogation with and inconsistent with the law governing the residence of railroad corporations at the time Chapter 351 was adopted, §351.375 does not apply to railroad corporations. As such, defendant BNSF resides in the City of St. Louis.

At the risk of sounding redundant, and in partial defense of the Legislature, nowhere is it written in the Missouri Statutes that a corporation resides – for venue purposes – exclusively where it places its registered agent. Thus, it is the interpretation of §351.375 fostered by BNSF that runs in derogation and limitation of existing law. Simply put, any judicial extension of §351.375 to railroad corporations is pretermitted by §351.690(4).

C. Arguments By Respondent

The proceedings after oral argument in this case are unusual, primarily because Relator will not have the last word. Since this Court’s September 17, 2002 Order does not allow for a reply brief, Relator must anticipate how Respondent might analyze the statute cited by the Court. None of these potential arguments change the fact that BNSF resides in St. Louis City.

In addition to the first clause of §351.690(4), which has been the focus of the above discussion, there is a second clause of the subsection. This second clause, which begins with the phrase “and without limiting the generality of the foregoing,” provides

for certain narrow exceptions to the first clause. Therefore, certain provisions of Chapter 351 from which railroad corporations would otherwise be exempted pursuant to the first clause of §351.690(4) can nonetheless apply. Importantly, however, §351.375 is not among these provisions.

The two types of provisions specifically described in the second clause of subsection (4) are those which “permit the issuance of shares without par value and the amendment of articles of incorporation for such purpose.” §351.690(4). In no way whatsoever is §351.375 a provision that permits the issuance of shares without par value, nor is it a provision that permits the amendment of articles of incorporation to allow issuance of shares without par value. Therefore, it is clear that this portion of the second clause of §351.690(4) does not cause §351.375 to apply to railroad corporations.

Near the end of §351.690(4) it is stated that “those provisions of this chapter mentioned in subdivision (1) and (2) of this section will apply to all corporations mentioned in this submission” Respondent may well seize upon this language. Looking at subdivision (1) of the statute reveals the subject matter to be “reports, registration statements and payment of taxes and fees.” Because §351.375 is not a “provision of [Chapter 351] requiring reports, registration statements [or] the payment of taxes and fees,” it is not incorporated into the second clause of §351.690(4) as an exception to the first clause of that subsection. Section 351.375, which sets forth the procedure for a domestic corporation to change its registered office, does not require the payment of taxes or fees. Moreover, while §351.375 does require that a corporation file a

statement with the Secretary of State to change the location of its registered agent, such a filing cannot properly be classified as a report or registration statement, as those terms are used in §351.690(1). The reports or registration statements to which §351.690(1) refers are found in §351.120, entitled “Annual registration required, when.” Indeed, if §351.375 is considered to be a report or registration statement within the meaning of §351.690(1), then any provision requiring any filing could be so classified. Such a result would lead to the exception swallowing the rule. In sum, §351.375 is not made applicable to BNSF by virtue of §351.690(1).

Turning to subsection (2) of §351.690, the “provisions of the chapter referred to” are the “internal affairs of a corporation.” These “include, but [are not] limited to, matters of corporate governance, director and officer liability, and financial structure.” *Id.* Because §351.375 does not relate to the internal affairs of a corporation, it cannot apply to BNSF through this exception. First, §351.375 does not concern matters of corporate governance, director or officer liability, or financial structure. Changing the address of a registered agent does not affect how a corporation governs itself, nor the liability of its officers or directors, nor its financial structure.

Second, §351.375 does not relate to the internal affairs of a corporation, but rather relates to the affairs between corporations and the State. The canon of *noscitur a sociis* provides that “internal affairs” can best be interpreted by looking to its associated words and phrases. Here, the associated phrases are “corporate governance,” “director liability,” “officer liability,” and “financial structure,” none of which relate to the affairs

between corporations and the State. Instead, each deals with a matter that is strictly internal, with which the State does not concern itself. Conversely, where a corporation keeps its registered agent is of concern to the State. As such, §351.375 is not made applicable to BNSF by virtue of §351.690(2).

D. Respondent's Present Argument Regarding Section 351.690(4)

To date, BNSF's resort to §351.690(4) has been to say that it "extends the provisions of Chapter 351 of the Missouri statutes to almost all defendants, including foreign railroad corporations such as co-defendant BNSF." (Respondent's Brief, at 51). If this were true one wonders why the Legislature bothered to write a separate section of the corporation chapter for foreign corporations at all. In reality, the "catch-all" statute only extended certain provisions of Chapter 351 to railroad corporations, and none of these pertain to registered agents or corporate residence.

Since effect must be given to all statutes on the books and attempts must be made (perhaps against all odds) to reconcile them, the Court must conclude that §351.375 conflicts with §508.040, and therefore has no application to railroad corporations. To hold otherwise would be illogical.

CONCLUSION

Respondent's Order transferring this case was clearly wrong, and mandamus should issue to correct the injustice. Relator has pointed out that the O'Keefe decision of 50 years ago made corporate venue a matter of where a registered agent was located, which is completely at odds with the legislative intent as evidenced by §508.040. The

Court should reverse this course, and construe the statutes in such a way as to be consistent with each other.

At a minimum, the Court should refuse to apply §351.375 to a foreign corporation, particularly a foreign railroad corporation. During oral argument counsel for Relator was asked whether what Relator really seeks is for the Court to read the statutes as they are written. The answer is obvious but should also be emphatic. Simply reading the venue statutes and corporate statutes, giving words their plain meaning, and construing them in *pari materia*, decides this case. Foreign railroad corporations are not covered by §351.375. If there were any doubt about this before reading §351.690(4), any doubt is dispelled afterward.

The railroad defendant resides in the City and this Court should make peremptory its Alternative Writ of Mandamus.

Respectfully submitted,

GRAY, RITTER & GRAHAM, P.C.

By: _____

Patrick J. Hagerty #32991
Maurice B. Graham #18029
Morry S. Cole #46294
701 Market Street, Suite 800
St. Louis, Missouri 63101
(314) 241-5620
(314) 241-4140 (fax)

Joseph T. Buerkle
Co-Counsel for Plaintiff
709 East Main Street
P.O. Box 290
Jackson, MO 63755
573-243-8182
Fax: 573-243-0388

COUNSEL FOR RELATOR

CERTIFICATE OF SERVICE

I hereby certify that two copies of Supplemental Brief of Relator and a disk with a copy of Supplemental Brief of Relator was hand delivered this 30th day of September, 2002, and addressed as follows:

Mr. William A. Brasher
Brasher Law Firm, L.C.
One Metropolitan Square, Suite 2300
St. Louis, MO 63102
314-621-7700
Fax: 314-768-7010
Attorney for The Burlington Northern and Santa Fe Railway Company
and Mark C. Probst

Hon. Margaret M. Neill
St. Louis City Circuit Court
10 N. Tucker Blvd., Division 1
St. Louis, MO 63101
314-622-4311
Respondent

By: _____
Patrick J. Hagerty #32991
Maurice B. Graham #18029
Morry S. Cole #46294
701 Market Street, Suite 800
St. Louis, Missouri 63101
(314) 241-5620
(314) 241-4140 (fax)

Joseph T. Buerkle
Co-Counsel for Plaintiff
709 East Main Street
P.O. Box 290
Jackson, MO 63755
573-243-8182
Fax: 573-243-0388

COUNSEL FOR RELATOR

RULE NO. 84.06(b) CERTIFICATE

I hereby certify that this Reply Brief complies with the limitations contained in Rule No. 84.06(b) and that this brief contains 3,170 words according to the word count of MS Word.

RULE NO. 84.06(g) CERTIFICATE

I hereby certify that this disk has been checked for viruses in compliance with Rule No. 84.06(g) and that it is virus free.

GRAY, RITTER & GRAHAM, P.C.

By:

Patrick J. Hagerty	#32991
Maurice B. Graham	#18029
Morry S. Cole	#46294

701 Market Street, Suite 800
St. Louis, Missouri 63101
(314) 241-5620
(314) 241-4140 (fax)

Joseph T. Buerkle
Co-Counsel for Plaintiff
709 East Main Street
P.O. Box 290
Jackson, MO 63755
573-243-8182
Fax: 573-243-0388

COUNSEL FOR RELATOR